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IN THE

Supreme Court of the United States

October Term, 19[illegible]

No. [illegible] 47

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, a corporation, and HOUSTON PIPE LINE COMPANY, a corporation, and EL PASO NATURAL GAS COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause September 24, 1963, and by which a divided Court reversed an Order of the Federal Power Commission.[1]

[1]Respondents below, in addition to the Petitioners herein, were the Federal Power Commission, People of the State of California, and the Public Utilities Commission of the State of California.

Citations to Opinions Below.

The Opinion of the Federal Power Commission is reported at 26 F.P.C. 606 and a copy is appended as Appendix A.

The Opinion of the Court of Appeals [R. 383] is reported at 323 F.2d 190 and a copy is appended as Appendix B.

The judgment of the Court of Appeals [R. 402] is appended as Appendix C.

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was dated and entered September 24, 1963 [R. 402], a timely petition for rehearing was filed on October 15, 1963 [R. 437], and was denied on December 17, 1963 [R. 467], without opinion, Rives, Circuit Judge, dissenting. A copy of the Order denying rehearing is appended hereto as Appendix D.

The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254 (1).

Question Presented.

The basic issue to be determined is whether the jurisdiction of the Federal Power Commission follows the *actual flow* of a commingled supply of natural gas from Texas to California in interstate commerce for resale, or whether this jurisdiction may be avoided by a *contract provision* which, while recognizing the actual flow, provides that for *contractual purposes* this commingled supply of gas shall be used for nonjurisdictional purposes.

Stated in another fashion, the issue is as to whether the jurisdiction of the Federal Power Commission is

dependent upon fact rather than fiction, upon *actual flow* of gas in interstate commerce rather than upon *contractual flow.*

Statute Involved.

The statute involved is §717 of the Natural Gas Act. Section 717 is set forth in Appendix E *infra*, page 78.

Statement of the Case.

Petitioners herein were Intervenor-Respondents in the Court below and were also Intervenors before the Federal Power Commission in its Opinion No. 348 (26 F.P.C. 606)..

For the purposes of this Petition, we accept the facts as found by the Federal Power Commission and which are set forth in its Opinion No. 348 (Appendix A *infra*). El Paso Natural Gas Company (El Paso) is a natural gas pipeline company with an interstate pipeline system extending from its origin within the State of Texas to the State of California. El Paso proposes to increase its sources of supply, by obtaining gas from south Texas, through contracts which it has entered into with Houston Pipe Line Company (Houston) and Lo-Vaca Gathering Company (Lo-Vaca). In order to obtain the gas from these sources, it will be necessary to extend the El Paso interstate pipeline system from Sonora in west Texas to Three Rivers, Texas. It is proposed that El Paso Gas Supply Company, a subsidiary of El Paso, build the 227.6-mile 30" pipeline required for this purpose. Both Houston and Lo-Vaca would deliver their contracted supplies of gas to El Paso at Three Rivers. At this point the Houston and Lo-Vaca gas would enter the El Paso Natural Gas Company interstate pipeline system as extended.

The Federal Power Commission found that the gas to be provided by Houston and by Lo-Vaca, pursuant to the contracts which are the subject of this proceeding, would form part of a commingled stream of gas flowing from Texas through New Mexico and Arizona into California, and the commingled stream of gas would physically be used to supply El Paso's customers gas which would be in turn resold by them in interstate commerce. The contracts under which those gas supplies would be furnished provide in essence that the gas is to be used for nonjurisdictional purposes. Despite the contractual provisions, the gas would actually flow as heretofore described. None of the parties herein has at any time claimed that the gas supplied by Houston and Lo-Vaca would not physically flow in interstate commerce for resale. Respondents contend, however, that the contractual provisions for nonjurisdictional use of the gas prevail over the admitted flow of the gas in interstate commerce for resale. The majority opinion in the Court below conceded that this Houston Lo-Vaca gas would actually be resold in interstate commerce. The decision states at page 191 of 323 F. 2d:

> "The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted . . ."

Despite this, the majority opinion held that the contractual provisions prevailed.

Basis of Jurisdiction.

Federal jurisdiction in the Court of first instance was based upon the fact that the case comes properly within the provisions of the Natural Gas Act, 15 United States Code.

Reasons for Granting the Writ.

The proposed physical flow of Houston Lo-Vaca gas through the El Paso interstate pipeline system to California for resale would subject their respective sales of gas to El Paso to the jurisdiction of the Federal Power Commission. An effort is made to provide by contract what, in fact, cannot physically be accomplished, and by this subterfuge to seek to escape regulation. The author of Alice in Wonderland would indeed be impressed by the fantasy which has been sought to be created in this proceeding. Forty-five per cent of the El Paso jurisdictional sales are to the Southern California Gas Company and Southern Counties Gas Company of California at the California border, with an additional forty-five per cent being sold to Pacific Gas and Electric Company, a northern California utility, also at the California border. Accordingly, by far the major part of gas supplies purchased by El Paso are destined for resale in California and are delivered through El Paso's interstate pipeline system stretching from Texas to California. Upon receipt of the Houston Lo-Vaca gas, this gas will form part of that flow.

I.

The Flow of Gas in an Interstate Pipeline System as Part of a Commingled Supply of Gas Destined for Resale in Interstate Commerce Subjects Such Gas to the Jurisdiction of the Federal Power Commission.

The *fiction* of intrastate use must yield to the *fact* of interstate commerce.

Gas to be provided by Houston and by Lo-Vaca under and by virtue of their contracts here in question with El Paso,

> ". . . inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, . . ." [R. 211].

The majority opinion concedes on page 191 of 323 F. 2d that:

> ". . . the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted . . ."

The jurisdiction of the Federal Power Commission applies to:

> ". . . the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . ." (15 U.S.C. §717(b)).

In the case of *F.P.C. v. Natural Gas Pipeline Company* (1942), 315 U.S. 575, 86 L. Ed. 1037, the U. S. Supreme Court stated at page 582:

> "The sale of gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress."

Accordingly, the basic facts are: Because gas to be sold under the contracts in question "inevitably would be physically transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California," it is the duty of the Federal Power Commission to carry out the purpose of the Natural Gas Act by exercising its jurisdiction over the sales for resale in interstate commerce involved in each of the contracts here in question.

Any lingering doubt which could have existed that this is so, has been completely dispelled by the decision reached by this very Court earlier this month in the case of *F.P.C. v. Southern California Edison Co., et al.*, ... U.S. ..... (Nos. 71 and 73, dated March 2, 1964). In that case, commonly referred to as the *Colton* case, this Court reversed the decision of the Court of Appeals for the Ninth Circuit, and thereby affirmed a finding and decision by the Federal Power Commission that because out-of-state energy from the Hoover Dam in Nevada was included in the energy delivered by Edison to its customer, the City of Colton, California, the Federal Power Commission had jurisdiction over the sale of electrical energy as a sale in interstate commerce. In reaching that conclusion this Court stated:

> "We have said of Part II of the Power Act that 'federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic or governmental, test.*' *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 529. (Italics supplied.) We have examined the proofs. They are in sharp conflict but we hold that the engineering and sci-

entific evidence received by the Commission on the subject from the Commission's own experts afforded substantial evidence upon which to rest the findings which trace out-of-state energy to the City of Colton." (Footnote 5, page 4, Slip Opinion, *FPC v. So.Cal.Edison Co., supra.*)

Moreover, any possible contention that the flow of electric energy under the Federal Power Act might be different than the flow of gas energy under the Natural Gas Act has been dispelled by this Court's statement at page 6 of its opinion:

"In reviewing the court's ruling on this question we do not write on a clean slate. In decisions over the past quarter century we have held that Congress, in enacting the Federal Power Act and the Natural Gas Act, apportioned regulatory power between state and federal governments according to a test which this Court had developed in a series of cases under the Commerce Clause. *The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned; and §201 (b) of the Power Act has its counterpart in §1(b) of the Gas Act, 15 U.S.C. §717(b), which became law three years later in 1938.*" (Emphasis supplied.) (Slip Opinion, *FPC v. So. Cal. Edison Co., supra.*)

This, of course, because of the provisions of Section 1(b) of the Natural Gas Act, is why the Federal Power Commission assumed jurisdiction over the instant sales involved in the present proceeding before this Court.

With the infinite capacity of the human mind to obfuscate simple, clear, basic issues, there have been efforts—as in this proceeding—to endeavor to circumvent these simple truths of the flow of this gas in interstate commerce for resale. Such endeavors are, of course, not new to the history of mankind, and history is largely composed of a record of the struggle between simple basic truths, and the effort to circumvent them.

It is clear, as reflected in the decisions of the courts of the United States, that the scales of justice are increasingly tipped in favor of reality, and that those selecting fantasy and imagery as their weapons, are increasingly doomed to defeat. It is true that our legal history does not reflect a uniform line of victories in the battle of substance versus form. In fact, the art of advocacy historically has involved an effort to avoid or circumvent matters of *substance* by the exercise of ingenuity in devising appropriate matters of *form*.

No longer can it be said, however, that when a matter of substance under the law clearly requires one result, the merits of the matter may be avoided through the astuteness of the artisan attorney in placing a different wrapping upon the very same package.

In the few situations where this has not been the result, upon the matter coming to light, upon being reexamined, the vestigial remains of another era are being appropriately disposed of. The realm of the law today is *reality*, and not *fantasy*.

The contentions advanced by the Respondents actually amount to no more than urging that the Courts ignore the *reality* that interstate commerce will in fact

occur, in favor of *fantasy*. A fantasy is urged that because the contracts in their language provide interstate commerce shall not occur, the Court should blind itself to and ignore the concededly true facts that Houston and Lo-Vaca gas will flow in interstate commerce for resale.

Mere words, which change nothing and affect nothing, are not a proper foundation for a judgment by this Court, ignoring what are conceded to be the true facts that the gas flows in interstate commerce.

Words that change and control the course of events may, upon appropriate occasion, form the basis not only for judgments by courts but by other bodies and persons. Words that move a people to their destiny—the words of a Winston Churchill forming a protective shield between the German legions at the shores of the English Channel, and the inspired people of the British Isles—are such words that change, fix, and control the course of human events.

The words upon which Respondents rely do not even affect the movement of gas to which they purport to apply. They control nothing; they change nothing; they fix nothing; they are nothing. They are words lost in the flow of Houston and Lo-Vaca gas westward through El Paso's interstate pipeline system for resale in the states of New Mexico, Arizona and California.

The flow of Houston and Lo-Vaca gas in interstate commerce is in no manner whatsoever affected by the contractual provisions. The flow of Houston and Lo-Vaca gas will remain precisely the same regardless of whether the contractual provisions referred to are in the contract or not. Not one more molecule of gas will

be used at El Paso's plant in Texas, or New Mexico, or Arizona because of the contracts in question herein, as the historical pattern of use at such plants will be continued.

From the moment of its entry into the El Paso interstate pipeline system near Three Rivers, Texas, this Houston gas will be commingled with and form part of, a commingled supply of Lo-Vaca and other gas destined for interstate commerce for resale.

The majority opinion's misconception of the issue before the lower court is demonstrated by its statement of the issue as,

> ". . . . the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its 'non jurisdictional' status." (Majority Opinion, page 191 of 323 F.2d.)

It is not commingling in and of itself which determines whether interstate commerce exists. For instance, if gas were received in the State of Texas from New Mexico and commingled with this Houston gas and none of this commingled gas thereafter left the State of Texas, it would be folly to contend that this Houston gas, because of the commingling with New Mexico gas, is gas in interstate commerce and therefore subject to the jurisdiction of the Federal Power Commission. However, it is equal folly to state that gas, which in fact forms part of a commingled supply of gas and actually flows in interstate commerce as a part of that commingled gas into the State of New Mexico, back into Texas, and on west to California for ultimate consumption, does not flow in interstate commerce and is not subject to the jurisdiction of

the Federal Power Commission merely because some provision in a contract provides that the gas shall be transported solely within the State of Texas and consumed solely within the State of Texas.

This Court is not in a position to blind itself to the facts of life. We are not here dealing with some fanciful, remote connection with interstate commerce upon which to base the jurisdiction of the Federal Power Commission. When we are speaking of this new supply of south Texas gas, which is to be transported west to California, we are speaking of the epitome of what constitutes interstate commerce. This gas was not acquired in order to supply El Paso stations from Sonora to El Paso Station nor from Sonora to Dumas. This gas was acquired in order to satisfy the increasing demand for gas in the western portion of the United States and, more specifically, in the State of California.

The entire contractual provisions in the contracts in question pertaining to their so-called "restricted use" are nothing but the creation of a fiction.

To point up the scope of the fantasy sought to be created by the contracts, consider these particular facts. El Paso purchases approximately 2,500,000 Mcf of gas daily within the State of Texas. [R. 68]. The daily gas supply from Houston of 70,000 Mcf would therefore comprise only 2.8 per cent of the total Texas gas supply. Isn't it rather ridiculous to assume that Houston gas, comprising merely 2.8 per cent of the total Texas gas supply, which flows within the large El Paso pipelines forming a portion of its extended interstate pipeline system for hundreds of miles both within the State of Texas and elsewhere, is so identifiable, is so separate from other transactions in interstate

commerce, that it can be said that this gas is used to supply 100% of the fuel requirements of El Paso plants hundreds of miles apart within the State of Texas and is thereby displacing the gas presently being used for such purposes?

If this Court holds that the *fact* of interstate commerce must yield to the *fiction* of intrastate use as expressed in a contract, a modern Noah's Ark is instantaneously required to save the Commission from the deluge of a flood of applications based on *interstate sales through intrastate contracts.*

Under the Houston and Lo-Vaca purchases, 200 M²cfd will be added to the over-all El Paso Natural System supplies of gas to be transported westward toward California. There is no evidence in this proceeding that there will be any increase whatsoever in the consumption of gas within the State of Texas, nor even in Arizona and New Mexico, because of access to these new south Texas supplies.

The California market *is* the El Paso market—bearing in mind the volumes of gas purchased from El Paso for resale in California. Additional volumes of gas purchased by El Paso are for all system purposes, including the major function of supplying the California gas market. The contractual provisions of the Houston Lo-Vaca contracts in no manner affect those basic facts.

It is inevitable that gas flowing through an integrated interstate pipeline system will be devoted to total system use. In the case of El Paso, which devotes 80 per cent of the gas which it sells to its market in California, the inevitable consequence is that additional gas supplies obtained by it will in major portion be disposed

of by way of a sale for resale to the California market. Because the Federal Power Commission recognized these elementary facts of the operation of the natural gas business, and of El Paso Natural Gas Company as an integrated interstate pipeline company, the Commission held the instant sales subject to its jurisdiction as sales in interstate commerce for resale.

The thorough grasp by the Commission of the problem confronting it, and its realization of the flood of applications which would occur (similar to the present one) should it approve such a *sham* as permitting a contractual provision to prevail over the actual course of events, resulted in the well-stated decision in this proceeding.

The Houston and Lo-Vaca gas supplies will flow through El Paso's interstate pipeline system as part of a commingled supply of gas destined for resale in interstate commerce. The corresponding jurisdiction of the Federal Power Commission, must and does attach.

II.

The Decision Below Conflicts in Principle With a Prior Holding of This Same Circuit Court.

The Federal Power Commission must exercise jurisdiction over sales of gas which form part of a commingled supply of gas flowing in interstate commerce for resale.

The Court of Appeals for the Fifth Circuit in the case of *Deep South Oil Co. of Texas v. F.P.C.* (1957), 247 F. 2d 882, upheld the finding by the Federal Power Commission of its jurisdiction over certain interstate commerce sales of commingled gas supply. Deep South sold its gas to two interstate pipeline companies, with the

meters being located on the leases near the wellheads from which the gas was being produced in the State of Texas. This gas was later commingled with other Texas-produced gas, and a portion of the commingled supply was resold in interstate commerce. Deep South filed a petition for a declaratory order that its sales of Texas gas were not subject to regulation under the Natural Gas Act.[2] The proceeding was consolidated for hearing with proceedings on two similar petitions filed by Shell Oil and Humble Oil.[3]

As the Fifth Circuit recognized, when Congress passed the Natural Gas Act,

> ". . . . Congress was fully informed as to the need for such regulation and among other considerations it was cognizant of the fact that the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies."[4]

The Fifth Circuit then pointed out at page 886 of 247 F.2d:

> "It was strongly urged to Congress that the public cannot be protected from exploitation in the prices charged for natural gas unless Government shall control not only the price charged by the companies which deliver the gas to the consumer, but also the prices of all companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution."

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[2]Similar to the proceeding brought herein by Houston.

[3]Similar to the consolidation of the Houston and La Vaca matters herein.

[4]*Deep South* opinion at page 886 (247 F.2d 882).

Accordingly, it held that the sales of the commingled supplies of gas were subject to the jurisdiction of the Federal Power Commission by virtue of the provisions of Section 1(b) governing sales for resale in interstate commerce.

Petitioners, Southern California Gas Company and Southern Counties Gas Company of California, are the local distributing companies in Southern California which receive interstate supplies of natural gas from El Paso—receiving in fact in excess of 45 per cent of El Paso's total jurisdictional sales. As recognized by the Congress as herein quoted from the *Deep South* opinion:

> ". . . the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies."[5]

If, in fact, the Federal Power Commission does not have the jurisdiction to control the price of gas charged in the contracts between El Paso and the two suppliers, Houston and Lo-Vaca, then the purpose of the Congress concerning protection of the public "from exploitation in the prices charged for natural gas", as recognized by the Fifth Circuit in the *Deep South* opinion, will have been successfully obviated by the relatively simple device of placing words in a contract to the effect that the gas shall be used for a nonjurisdictional use, when in fact, concededly under the evidence in the record, there is no possible manner by which the actual use of the gas may be so restricted. Without Federal Power Commission jurisdiction there will be no control of the price charged by Houston and Lo-Vaca which

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[5]See Footnote 4 *supra*.

are prices of "companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution."

As the Fifth Circuit pointed out at page 887 of 247 F.2d:

> "In numerous decisions, the Supreme Court has recognized that the Act was primarily designed to protect consumer interests against exploitation at the hands of private natural gas companies, ..."

This purpose would be completely thwarted should Respondents herein succeed in avoiding control by the Federal Power Commission over the extremely high priced gas which they propose to sell pursuant to these contracts. This increased cost would, of course, be passed on to the purchasers of gas supplies from El Paso, and as pointed out in the Federal Power Commission's Opinion and Order:

> "The greater part of its gas supplies is sold to its California customers at the border of that state." [R. 256.]

As was pointed out by the Federal Power Commission in its holding that it had jurisdiction of the sales at issue in this proceeding:

> "If we reached a conclusion different from that above, our regulation of gas rates would be handicapped. It would be possible, as in this case, for a pipeline to offer to purchase gas at a higher price than we would otherwise allow in the area upon the assertion that it would use this gas in its compressors or would deliver it to its intrastate customers even though the gas would actually be received into its general system transportation facilities and used for every system purpose." [R. 269.]

The majority opinion herein by the Fifth Circuit is obviously contrary to the principle established by that Court in its *Deep South* opinion. In the instant decision the majority opinion relies for support upon the *dissent* in the *Deep South* case, while Justice Rives in his dissent in this proceeding in the Fifth Circuit quite correctly points out that in the *Deep South* case and its companion case of *Shell Oil Co. v. F.P.C.* (5 Cir. 1957), 247 F. 2d 900, the Fifth Circuit had held that:

> "Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas."

This is, of course, eminently correct. Justice Holmes stated in the case of *Eureka Pipe Line Co. v. Hallanan* (1921), 257 U.S. 265, that:

> "As has been repeated many times, interstate commerce is a practical conception . . ." (p. 272).

In applying this practical conception, Justice Holmes stated for the Court that:

> "A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholesale to freight passing across the continent." (p. 271).

Justice Rives in his dissent in this proceeding before the Fifth Circuit pointed out at page 197 of 323 F. 2d:

> "In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g., Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922,

260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.'"

It is, of course, the *Connecticut* case relied upon by Justice Rives which this Court has reaffirmed in the *Colton* case in reaching its conclusion that Federal Power Commission jurisdiction follows the physical flow of energy in interstate commerce.

III.

The Decision Below Will Have an Adverse Effect on the Administration of a Federal Statute Intended to Protect the Consumer.

This Court in the case of *Phillips Petroleum Co. v. Wisconsin* (1954), 347 U.S. 672, 98 L.Ed. 1035, stated:

> "'Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. *Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act.*'" (Emphasis added.)

If as stated, "Protection of consumers against exploitation at the hands of natural-gas companies was

the primary aim of the Natural Gas Act", it would ill serve that purpose for this Court to hold that, contrary to the fact of flow of gas in interstate commerce, parties may by the mere employment of selected language in a contract—by the exercise of sheer imagination—and without affecting in any manner whatsoever the actual interstate flow of gas, completely abrogate or subvert the intent of Congress to protect "consumers against exploitation".

In the noted *Phillips* decision the United States Supreme Court held that the Federal Power Commission must, regardless of its reluctance to do so, regulate sales of gas by producers in the field when such sales of gas are destined for resale in interstate commerce. The sales of gas of Houston and Lo-Vaca in this proceeding are sales of gas which will actually flow in interstate commerce for resale, and accordingly the Federal Power Commission must and has assumed jurisdiction thereof by its decision in this proceeding.

The Respondents herein, in their Brief filed with the Fifth Circuit, quite candidly stated at page 27:

> "From the facts of record, . . . it is obvious that Houston and Lo-Vaca carefully tailored their restricted-use contracts with El Paso to be exempt from Commission jurisdiction."

There is not even a pretense that there is any valid business purpose to these contractual provisions, other than the effort to avoid the jurisdiction of this Commission. The contract with Houston, which provides that the gas shall be used only for intrastate purposes, obviously has no business purpose except to attempt to comply with the provisions of the contracts which

Houston has with its producers that it shall not sell the gas in manners which would subject the sales to the jurisdiction of the Federal Power Commission. Nothing is being added to the supply of gas to be consumed within the State of Texas, for the same volumes are to be used as presently consumed, and as there is to be no cutback in the sources of supply presently used to supply these stations, it is quite obvious that an additional supply of gas—whether you label it as Houston gas or not—will flow in interstate commerce. Parties may not confer jurisdiction upon the Federal Power Commission by their language in a contract, nor may they avoid that jurisdiction by language selection.

The Court has quite recently rendered a decision which clearly points to the required result in this proceeding. In the case of *Northern Natural Gas Co. v. State Corporation Commission of the State of Kansas* (1963) 372 U.S. 84, 9 L.Ed.2d 601, 83 S.Ct. 646, the Court reaffirmed the now well-established doctrine that:

> "The Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company.'" (p. 607.)

The Court pointed out in a footnote to the statement that, "Persistent efforts to narrow the scope of the broader exclusive federal jurisdiction conferred by the statute have been unavailing."

In refusing to remand the case to the Kansas Supreme Court in order to permit the Kansas court to modify the contract so as to avoid the interstate conse-

quences of the particular contracts, the Supreme Court stated at page 611 of 9 L.Ed.2d:

> "For, if the federal question could be avoided or postponed just short of actual collision, by ad hoc accommodation on the part of every State, then the scope of federal regulatory power would vary in accordance with the kaleidoscopic variations of local contract law."

Nor should "the scope of federal regulatory power . . . vary in accordance with the kaleidoscopic variations of . . . contract" provisions which do not affect the actual flow of gas in interstate commerce. The actual flow of Houston, Lo-Vaca gas in interstate commerce will be precisely the same regardless of what use of the gas is provided for in the contracts. Accordingly, it would be a mockery of our judicial system to hold that the flow of regulatory power over the flow of the Houston Lo-Vaca gas in interstate commerce will vary in accordance with the kaleidoscopic variations of contract provisions.

As pointed out by this Court in the *Northern Natural* case, *supra* (footnote 9, p. 607):

> " 'Attempts to weaken this protection of consumers against exploitation at the hands of natural gas companies by amendatory legislation exempting independent natural gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language.' "

If the purposes of the Natural Gas Act are to be achieved, the split decision herein by the Court of Appeals must be reversed.

IV.

The Same Issues Here Will Recur and Are Pending In Another Circuit Court.

Considering the rapid growth of the natural gas consumption and the ever-expanding development of natural gas resources, it seems clear that this troublesome question is apt to recur, particularly if the protective jurisdiction of the Federal Power Commission may be avoided by language selection. At the present time, there are outstanding at least two Federal Power Commission decisions which are based in part upon its prior opinion in this case. They are its *Montana-Dakota Utilities* Decision (No. 395, dated July 15, 1963, unreported) and its *United Gas Pipe Line* Decision (No. 401, dated August 26, 1963, unreported). The *Montana-Dakota Utilities* Decision is presently pending in the United States Court of Appeals for the Eighth Circuit (No. 17445 and No. 17492).

That the probable recurrence of a troublesome question based upon a federal statute is proper ground for a grant of Certiorari by this Court was established in *United States v. Standard Oil Company of California*, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947).

Conclusion.

The ruling below invokes uncertainty into the Natural Gas Act and makes its administration by the Federal Power Commission haphazard and inconsistent, leaving the consuming public without the protection which Congress intended and to which this Court has held it is entitled. The Federal Power Commission has the authority and commensurate duty imposed on it by the Natural Gas Act to regulate the sales for resale in interstate commerce involved in this proceeding. This Petition for a Writ of Certiorari should, therefore, be granted to settle the issue with finality.

Respectfully submitted,

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March 13, 1964.

APPENDIX A.

Opinion and Order Determining Jurisdiction.

Lo-Vaca Gathering Company, Docket No. CI60-693; Houston Pipe Line Company, Docket No. CP61-177.

(Issued October 23, 1961)*

Before Commissioners: Joseph C. Swidler, Chairman; Jerome K. Kuykendall, L. J. O'Connor, Jr., and Charles R. Ross.

Swidler, Chairman:

As set forth by the presiding examiner in his decision issued August 11, 1961, these proceedings concern the question whether we would have jurisdiction under the Natural Gas Act over proposed sales of natural gas by Lo-Vaca Gathering Company and by Houston Pipe Line Company to El Paso Natural Gas Company. The proceedings arose by Lo-Vaca's filing on June 1, 1960, CI60-693, of an application for a certificate of public convenience and necessity and the filing by Houston on December 27, 1960, CP61-177, of a petition for a declaratory order under Section 16 of the Natural Gas Act to remove uncertainty as to our jurisdiction over Houston's proposed sale.

The sales in issue here are purportedly designed to provide additional gas supply to be used by El Paso for the operation of its compressors and the gasoline plant of Phillips Petroleum Company in Ector County, Texas. El Paso comprises a large pipeline system which extends from the Permain Basin in Mexico and Texas by means of two large pipelines through New Mexico and Ari-

*Designated Commission Opinion No. 348; Initial decision appears on P. 617; rehearing denied by order issued December 12, 1961, 26 FPC ——.

zona to the border of California. Recently it acquired an additional pipeline extending from New Mexico to the Pacific Northwest. The greater part of its gas supplies is sold to its California customers at the border of that state.

In another proceeding, Docket No. CP60-101, El Paso Gas Supply Company, a wholly owned subsidiary of El Paso, filed with the Commission an application for a certificate authorizing it to construct a compressor station to be known as the Coquat Station located near the community of Three Rivers in Live Oak County, Texas, and a 30-inch pipeline approximately 227.6 miles in length, extending from the Coquat Station to a point of connection with El Paso's system at its Sonora Plant in Sutton County, Texas. At Coquat, the Supply Company would receive for the account of El Paso the gas proposed to be sold by Lo-Vaca and Houston, all of which, it is stated, would be produced in Texas.

Lo-Vaca is a Texas corporation of Corpus Christi, Texas, and a wholly-owned subsidiary of Coastal States Gas Producing Company, but at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract, which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf.[1] There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises

[1]The level of the rate is not in issue at this stage in the proceedings.

over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

Houston is a Texas corporation of Houston, Texas, and a wholly-owned subsidiary of the Houston Natural Gas Corporation. Since 1925, it has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a

formula which, if applied to the billing month of November, 1959, would have produced 19.5¢[1] plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, "El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas." El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

The record shows that gas received by El Paso at Coquat from La-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other

portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

El Paso proposed in Docket No. G-18616, now pending before the Commission, to supply its mainline compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6,001 M²cf per day and on a maximum day would exceed the supply by 31,879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An esti-

mated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21,373 M²cf per day on an average day and by 36,549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California.

After the filing of briefs, the examiner issued his decision on August 11, 1961. He found that Lo-Vaca's sale would be subject to the Commission's jurisdiction but that Houston's sale would not be. With respect to Lo-Vaca, he concluded that the Commission's decision in *Oklahoma Natural Gas Co.*, 23 FPC 291, and order denying rehearing, 23 FPC 531, were controlling. On the other hand he felt that the sale by Houston was controlled by the Commission's recent decision in *Shell Oil Company, et al.*, Docket Nos. G-5029, *et al.*, issued June 30, 1961, 25 FPC 1316.

Lo-Vaca, the Public Utilities Commission of California, Southern California Gas Company and Southern Counties Gas Company of California, and our staff filed exceptions to the examiner's decision. Lo-Vaca, citing authorities, argues that its sale to El Paso of gas contractually restricted for consumption in its fa-

cilities in New Mexico and Arizona would be a direct sale not subject to this Commission's jurisdiction. It emphasizes that this gas was the subject of a separate contract, that purchases from Lo-Vaca and deliveries to El Paso's facilities were separately metered, and that El Paso would consume as fuel volumes of gas in excess of the volumes received from Lo-Vaca. It contends that the commingling of the restricted use gas with gas intended for resale would not prevent the sale from being nonjurisdictional as a direct sale, although, of course, it admits the gas would be transported in interstate commerce. The California Commission and our staff objected to the examiner's failure to find jurisdiction over Houston's sale to El Paso. The California Commission argues that the contractual expressions of intention cannot override the physical fact of interstate transportation and sale. It expresses the fear that if some of the gas purchased by a pipeline could be restricted in the manner herein contemplated, the Commission would lose control over a substantial portion of field prices, and there would result uneconomical expenditures on the part of the pipelines in order to attach reserves for the intrastate market. It contends further that consumers of the interstate gas would ultimately have to bear any higher price for compressor fuel gas not subject to our regulation.

The staff's position is that Houston's sales and Lo-Vaca's sales would be subject to our jurisdiction and that this cannot be avoided by contractual restrictions on the gas sold. The staff argues that the Houston and Lo-Vaca gas would flow in continuous movement from Texas to markets in other states where it would be resold and the fact that Houston's and Lo-Vaca's

gas would be mixed in El Paso's facilities with gas from other sources would have no effect on the jurisdictional status of Houston's and Lo-Vaca's sales. The staff argues further that it is not logical to treat Houston's sales as non-jurisdictional and Lo-Vaca's sales as jurisdictional and that we are not authorized to put into the hands of buyers and sellers of gas the power to determine by contract the jurisdictional status of their sales. To do so the staff contends would create a serious regulatory gap. Likewise, among other points, the two southern California companies contend that Houston's gas would be mixed with other gas and would flow outside of Texas to California and the sale of this gas would not be removed from our jurisdiction because of a contractual device.

On this record, the briefs, the examiner's decision and the exceptions, the question before us is whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system. In our opinion, as discussed below, such a segregation would not be achieved here and both sales would be subject to our jurisdiction.

The Natural Gas Act as shown in Section 1(b) applies "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use * * * but shall not apply to any other transportation or sale of natural gas * * *." It is clear enough that physically the specific gas sold by Lo-Vaca and Houston

would actually in part be resold to customers outside of Texas and it would be physically impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state. It would be contrary to the facts to assume that the restricted gas would go only to the compressor stations, while other gas purchased by El Paso would be sold for resale. Thus, literally, the gas sold by Houston and Lo-Vaca would come within the wording of the statute as sold in interstate commerce for resale.

In reaching this conclusion, we are cognizant of the fact that there exist in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources. Although under some of the transportation arrangements, gas is purchased by the ultimate recipient directly from producers, generally there is no earmarking of specific gas to the ultimate destination. The delivering company is simply obligated to deliver a specified volume. In such a case, the volume of gas purchased may be compared to a "contract demand volume" since there is no earmarking of any volume as delivered from a particular source. It is not our intention by this opinion to disturb such transportation arrangements. What we say in this opinion relates only to what constitutes interstate commerce and our jurisdiction under the Natural Gas Act.

It is well settled that the business of selling and transporting gas, electric energy and other goods from one state to another constitutes interstate commerce. This is true of a sale of grain in one state which is to be transported by the buyer to another state. *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 55; *Dahnke-Walker*

Co. v. Bondurant 257 U.S. 282, 290, as well as the auction of tobacco to be transported by the buyers to points outside the state, *Currin v. Wallace*, 306 U.S. 1, 10, and the purchase of cattle transported from another state, *Swift and Co. v. United States*, 196 U.S. 375, 398-399, where Justice Holmes said, "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." Sales of gas by interstate pipeline systems are sales in interstate commerce where the gas sold has been produced in another state even when mixed with gas produced in the same state. *Missouri v. Kansas Gas Co.*, 265 U.S. 298, 306; *P.U.C. of Kansas v. Landon*, 249 U.S. 236, 245. When such sales are for resale, they are subject to our jurisdiction. *Panhandle Eastern Pipe Line Co. v. Comm'n.*, 332 U.S. 507, 516-517; *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582. In the latter case, the Court said:

> The sale of gas originating in one State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress

The same conclusion applies to sales of electric energy generated in another state although mixed with energy generated in the state of sale. *Pennsylvania Water and Power Co. v. F.P.C.*, 343 U.S. 414; *Wisconsin-Michigan Power Co., v. F.P.C.*, 197 F. 2d 472 (CA7), *certiorari* denied 345 U.S. 934. Sales of electric energy in the state of generation where the energy is to be transmitted out of the state and consumed in another state are also in interstate commerce. *Public Utilities Comm. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83;

Hartford Electric Light Co. v. F.P.C., 131 F. 2d 953 (CA2), *certiorari* denied 319 U.S. 741. In *Jersey Central Co. v. F.P.C.*, 319 U.S. 61, 71-72, it was said:

> If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile.

Of particular relevance to this proceeding, it has been held in many cases that a sale of gas in the producing state where the gas is to be transported and sold for resale in another state is a sale in interstate commerce and subject to our jurisdiction. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682-684; *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 687-688; *Saturn Oil & Gas Co. v. F.P.C.*, 250 F. 2d 61 (CA10) *certiorari* denied 355 U.S. 956; *Continental Oil Co. v. F.P.C.*, 247 F. 2d 904 (CA5); *Deep South Oil Co. v. F.P.C.*, 247 F. 2d 882 (CA5),[2] *Shell Oil Co. v. F.P.C.*, 247 F. 2d 900, 903 (CA5), *certiorari* denied 355 U.S. 930. In the *Phillips* case the Court said (347 U.S. at p. 682):

> * * * we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company.

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[2]Certiorari was in effect denied in companion *Shell* case next cited.

In the *Saturn* case, which involved wellhead sales of natural gas to two interstate pipelines by a small unintegrated oil company, the court said:

> The Phillips decision holds that the Act applies to all wholesales by producers. Saturn may not escape regulation because of its size or because of the restricted nature of its operations.

Deep South is also a small unintegrated producer of oil and gas selling gas to a gatherer and processor which, in turn, sells Deep South's gas, mixed with other gas, to an interstate pipeline. The court said in reply to a contention that the Deep South's sales were made for manufacture not resale (247 F. 2d at p. 888):

> The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act.

We are of the opinion that the principles expressed in these cases are not changed by the contractual provisions with respect to the disposition of the gas here involved. It is the "nature of the beast" not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract. *Atl. C.L.R.R. v. Standard Oil Co.*, 275 U.S. 257, 268; *B.&O.S.W.R.R.Co. v. Settle*, 260 U.S. 166, 170. With respect to the Federal Power Act which is similar to the Natural Gas Act, the Supreme Court has said, "Federal jurisdiction was to follow the flow of electric energy, an engineering and

scientific, rather than a legalistic or governmental test" *Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515, 529.

In *Shell Oil Co. v. F.P.C. supra*, gas was sold to Phillips which processed it, removed liquefiable hydrocarbons and resold the residue gas to El Paso. In attempting to refute our jurisdiction Shell relied on its contract with Phillips providing that the gas was conveyed to Phillips for the purpose of manufacturing gasoline. The court pointed out that there was actually no restriction on the disposition of the residue gas, and added (247 F.2d at p. 903):

> But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture", but upon the actual disposition of the gas.

In addition to the above considerations, the character of sales by Houston and Lo-Vaca is shown by the nature of El Paso's operations. El Paso is engaged in an enterprise extending from Texas to California and from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by which fuel could reach its Texas compressor stations for the Houston gas commingled with other gas in El Paso's main line

would physically move out of Texas although some portion might travel through the proposed 16-inch line.

The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states. In *El Paso Natural Gas Co.*, 22 FPC 260, 277, 278,[3] we found that El Paso operated an integrated natural gas pipeline system and that it would be discriminatory to determine just what gas goes to each of the several customers. In our opinion the sale of gas to this interstate system, which would be used for system purposes and, at least in part, would leave the state and be sold for resale and consumed outside the state, would be subject to our jurisdiction. The situation may be compared in reverse to our decision in the *Penn Water* case.[4] There we found that sales in Pennsylvania by an integrated electric system were sales in interstate commerce and subject to our jurisdiction, although part of the energy sold had been generated in the same state. The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by the terms of the contracts but actually would become system gas along with the gas of other producers who did not receive this contractual treatment.

While the El Paso system provides a good example of an integrated system and this fact supports our con-

[3]Remanded on other grounds as *El Paso Natural Gas Co. v. F.P.C.*, 281 F. 2d 567, (CA5) *certiorari* denied 366 U.S. 912.

[4]8 FPC 1, affirmed as *Pennsylvania Water and Power Co. v. F.P.C.*, 343 U.S. 414; see also *Kentucky Natural Gas Corp. v. P.S.C.*, 28 F. Supp. 509 (D.C.E.D. Ky.), aff'd 119 F. 2d 417 (CA6).

clusion here, we would reach no different result if the sales were to a single line system where physically the gas was mixed with other system gas and was physically transported out-of-state and sold in interstate commerce for resale. In this hypothetical situation, the gas sold would still be transported from one state to another and sold for resale, regardless of attempts by the parties, in their agreements with each other, to isolate and exclude such gas from our jurisdiction. As shown by the cases cited above, the touchstone to the question whether a sale of gas is for resale in interstate commerce is what is done with the gas, not what the parties may say about the transaction, verbally or in writing. Again we may say that the parties are not prevented by our conclusions here from entering into private arrangements with respect to the division of the gas or the ownership of the gas, but these arrangements will not prevent our jurisdiction attaching.[5]

If we reached a conclusion different from that above, our regulation of gas rates would be handicapped. It would be possible, as in this case, for a pipeline to offer to purchase gas at a higher price that we would otherwise allow in the area upon the assertion that it would use this gas in its compressors or would deliver it to its intrastate customers even though the gas would actually be received into its general system transportation facilities and used for every system purpose. It would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream and to be re-

[5]Of course, what effect, if any, such arrangements would have on the issuance of certificates, and allocations and rates is not before us.

sold and consumed in the state of production or used in compressor stations. This may increase the cost to interstate customers and at the same time put them at a competitive disadvantage in obtaining additional supplies of gas. While our jurisdiction is limited by the Natural Gas Act, and not by the wider scope of the Constitution, we may note that the sales contemplated here could not properly be regulated by the producing state. They would be sales that concern "more states than one"[6]; they would concern Texas but also New Mexico, Arizona and California and the distribution of the gas to the public whom the Natural Gas Act was designed to protect.

A number of cases have been cited in the briefs of the various parties in support of their contentions but they do not disturb our conclusions. In *U.S. v. Public Utilities Comm'n.*, 345 U.S. 295, we had found that a sale of electric energy by a California company to the Navy at an installation in Nevada was subject to our jurisdiction even though the greater part of the energy was to be consumed by the Navy (and would thus have been exempt from our jurisdiction if it had been a separate transaction) and only a small part was to be resold. The Supreme Court suggested that a separation of the resale and direct sale energy might have been achieved, although that did not show in the record. In this respect the case does not involve an interstate commerce question at all, but a possible segregation between a direct sale and resales. It does not concern the operation of an interstate pipeline, but merely the final consumption and distribution of the electric energy. Moreover, the Commission's jurisdiction was sustained. A similar problem was involved in *City of Hastings v.*

[6]*Gibbons v. Ogden*, 9 Wheat. 1, 194.

F.P.C., 221 F. 2d 31 (CADC), *certiorari* denied 349 U.S. 920, where the court affirmed us in finding that the direct sale of gas to the city for use in its power plant was not subject to our jurisdiction, although commingled with gas sold to the city for resale, where the direct sale gas had been excluded by the terms of the rate schedule applicable to the resale gas. In both these cases the gas or electric energy for the alleged direct sales was to be consumed in the state of sale for local purposes, while Houston's and La Vaca's gas would be sold to a pipeline system to enable it to carry on its interstate business.

The *North Dakota* case[7] presents the most serious problem of distinction. Whether or not that case was rightly decided is an open question.[8] In that case, we found that we did not have jurisdiction over "firm sales" of gas in North Dakota by certain producers to Montana-Dakota Utilities Company. The gas was produced in North Dakota and by contract was to be used in that state. Montana-Dakota was to use part of this firm gas to serve several communities from its line which extended westward into Montana. It was commingled in this line with "dump" gas sold by the same producer to Montana-Dakota under separate contracts to be used in North Dakota and Montana. All of this gas came from one compressor station and was not mixed with other gas from other North Dakota sources. Thus it was possible to measure the intrastate and interstate volumes attributable to the source.

The *North Dakota* case presents a far more limited situation with a single source of supply within the state

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[7] *Montana-Dakota Utilities Co., et al.*, 16 FPC 415 affirmed as *North Dakota v. F.P.C.*, 247 F. 2d 173 (CA8).

[8] See *Oklahoma Natural Gas Company*, 23 FPC 291, discussed below, where the Commission also declined to follow the case.

than that presented here. As can be seen from the citations set forth earlier in this opinion, it runs counter to the whole stream of the decisions of this Commission as to what constitutes a jurisdictional sale in interstate commerce and to the decisions of the Supreme Court construing this and other legislation. To the extent that *North Dakota* may be inconsistent with the action we take here, we believe it was erroneously decided.

In *Oklahoma Natural Gas Company*, 23 FPC 291, 531, we found that a sale by Oklahoma Natural to Consolidated Gas Utilities Corporation where the gas would be delivered into Consolidated's interstate pipeline in Oklahoma would be subject to our jurisdiction even though the companies agreed that an equivalent amount of gas would always be delivered by Consolidated to its customers in Oklahoma. It was, of course, clear that physically some of Oklahoma Natural's gas would be transported in Consolidated's pipeline outside of Oklahoma for resale. We thus held there, as we hold here, that a sale of gas in interstate commerce for resale cannot be transmitted into something else by contractual provisions.

In its exceptions Lo-Vaca contends that the examiner termed it a "pipeline company" in addition to being a "natural gas company". Lo-Vaca proposes to build a system of lines which will receive the gas from the producers, transport it and deliver it at Coquat, but the record is not sufficient to determine here whether it is a "pipeline company" in addition to being a natural gas company and it is not necessary to do so. However, on the basis of such facts as appear in the record, it would appear that both Lo-Vaca and Houston would be pipeline companies.

The Commission further finds:

(1) El Paso is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) El Paso Gas Supply Company upon the completion of the facilities proposed in Docket No. CP60-101 and the commencement of the sales proposed herein by Lo-Vaca and Houston would be engaged in the transportation of natural gas in interstate commerce, and would be a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act.

(3) The sale and delivery of natural gas by Lo-Vaca and Houston as hereinabove described, and as further described in the record and in the application, would result in Lo-Vaca and Houston being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca and Houston thereby would become natural gas companies within the meaning of the Natural Gas Act, and their respective sales to El Paso would be subject to our jurisdiction.

(4) The natural gas facilities proposed to be constructed and operated by Lo-Vaca and Houston, are to be used in the transportation and sale of natural gas in interstate commerce, and hence would be subject to the jurisdiction of the Commission and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

The Commission orders:

(A) Lo-Vaca's request that the examiner's decision be modified so as to find it would not be engaged in the sale of gas for resale in interstate commerce is hereby denied.

(B) Houston's petition for a declaratory order that neither it nor the sellers of gas to it would be natural gas companies subject to the Commission's jurisdiction under the Natural Gas Act on account of the proposed transactions described above is hereby denied.

(C) Exceptions not granted herein are hereby denied.

(D) The examiner's decision, as modified and to the extent that it is consistent with our findings and order herein is hereby adopted as the decision of the Commission.

Commissioner O'Connor, *dissenting in part,* filed a separate statement.

O'Connor, Commissioner, *dissenting in part:*

Since, in my opinion, the Presiding Examiner's decision should be adopted by the Commission as its decision herein, I dissent from the modification thereof.

In modifying the Presiding Examiner's decision, the majority recognizes that its opinion and order are inconsistent with *State of North Dakota, et al. v. F.P.C., et al.,* 247 F.2d 173 (CA8-1957). Their opinion states that:

> To the extent that the *North Dakota* case may be inconsistent with the action which we take in the instant case, we believe that it was erroneously decided.

The Court of Appeals stated the basis of its *North Dakota* decision as follows (p. 177):

> * * * As found by the Examiner and approved by the FPC, the gas received * * * at Tioga, North Dakota, is broken into two streams, one of which moves eastward in the Tioga-Minot, North Dakota, intrastate line. Clearly that is and can only be intrastate transportation not subject to FPC control. The other stream moves westward [into Montana-Dakota's integrated system, p. 175] but *before crossing any state line* a small portion of it goes off into the laterals serving the four North Dakota towns of Ray, Wheelock, Epping and Springbrook. The gas going into the Tioga-Minot intrastate line and to the four named North Dakota towns is *bought and paid for under the "firm gas" contracts.* We think, then, the gas sold pursuant to such "firm gas" contracts for consumption in North Dakota is clearly distinguishable from the "dump gas" sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota *in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota.* Accordingly, the *quantities* of intrastate gas purchased by Montana-Dakota under the "firm gas" contracts are easily identifiable and determinable. [Emphasis supplied.]

In that case, as in the Presiding Examiner's decision herein, the metering off within the producing state of

the contract quantities of intrastate gas before any of the gas stream had crossed a state line was held to be a clearly distinguishable separation despite the commingling thereof in said stream with other locally produced gas destined for interstate transportation and sale.

As to such commingling, the Court said in *North Dakota* (p. 176):

> * * * The fact that this ["firm"] gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ "dump gas" interstate contracts does not convert the 16¢ "firm gas" contracts into interstate contracts.

Obviously, under the physical flow theory applied by the majority herein, some molecules of the "firm gas" in the stream in the *North Dakota* case flowed into Montana for resale and the "firm gas" contracts thus could not have been held to be outside our jurisdiction. Hence, the necessity for them to depart herein from the judicial precedent established by the *North Dakota* case. To such a departure, I am opposed.

I agree with the majority that the expense of gas purchased for compressor use by interstate pipeline companies, as well as all other expenses of these companies, should be subject to our review and possible disallowance for ratemaking. However, I do not feel that the necessity for such review of these relatively small amounts of gas requirements is sufficient cause for the development of such a broad policy as that enunciated by the majority in this case.

In my opinion, the decision of the majority would effectively preclude the use of interstate pipeline company facilities for intrastate transmission of natural gas within the producer states for the use of the consumers and industries in those states without the producers of such gas being subject to the jurisdiction of the Federal Power Commission. It seems to me this is an unnecessarily harsh imposition on the consumers in the producing states whose resources and statutes have been availed of to permit the construction and operation of these interstate lines. There may be good and sufficient reasons (not the least of which is the cost of complying with regulatory reporting requirements) for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission.

It appears to me that the advantage to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers.

DECISION

Upon Application and Petition to Declare Certain Restricted-Use Gas Contracts to be Nonjurisdictional

(Issued August 11, 1961)

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A. SYLLABI OF POINTS DECIDED

1. The proposed sale and delivery in Texas of gas produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas will not become a sale in interstate commerce because it is to be moved in a commingled stream with other Texas-produced gas destined for interstate commerce, where the respective volumes of interstate and intrastate gas are metered and known and the intrastate gas is separated from the commingled stream before any of the stream containing the interstate gas leaves Texas.

2. The producer and gatherer of such wholly intrastate gas will not become a natural-gas company because of its intrastate sale and delivery of such gas to a natural gas pipeline for local fuel consumption.

3. The sale and delivery in Texas of gas produced wholly in Texas, but to be transported outside of Texas, in commingled stream with Texas and New Mexico gas destined for resale in interstate commerce for ultimate public consumption, and to be consumed outside of Texas will be a sale in interstate commerce because the gas will have entered the stream of interstate commerce and will have passed across the Texas border where some portion thereof will be resold to consumers outside of Texas despite the contractual obligation of the natural gas pipeline purchaser to draw from the stream an equal amount of gas for fuel in its compressor stations located beyond the Texas border.

4. The producer and gatherer of such gas destined for transportation and sale in interstate commerce will be a natural-gas company subject to the Natural Gas Act because of its interstate sale and delivery thereof to a natural gas pipeline company.

B. INTRODUCTORY STATEMENT

Freer, *Presiding Examiner:* This case involves the question as to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act (Act) over certain proposed sales and deliveries of natural gas to a natural-gas pipeline company, by two producers and/or gatherers thereof, at least one of them and the pipeline company being natural-gas companies subject to the jurisdiction of the Commission under the Act. The question arises out of an application filed by Lo-Vaca Gathering Company (Lo-Vaca) on June 1, 1960, in Docket No. CI60-693 for authority to sell and deliver natural gas to El Paso Natural Gas Company (El Paso) pursuant to the provisions of two certain contracts more particularly described below and a petition for a declaratory order pursuant to Section 16 of the Act filed by Houston Pipe Line Company (Houston) on December 27, 1960, in Docket No. CP61-177.

C. HISTORY OF THE PROCEEDING

1. The Filings on Which Hearing Was Held

(a) In the application filed by Lo-Vaca on June 1, 1960 (Item A), the applicant seeks authorization not only for the "gathering and sale" of natural gas (including construction of necessary facilities) pursuant to an admittedly jurisdictional (Tr. p. 24) contract entered into on May 16, 1960, but also, for the "gathering and delivery" of natural gas pursuant to a contract dated March 15, 1960, for El Paso's fuel consumption outside of Texas (Tr. p. 46), both by the Applicant and El Paso Natural Gas Company and as more particularly hereinafter described.

(b) In the petition filed by Houston on December 27, 1960, pursuant to Section 16 of the Act, the petitioner seeks a declaratory order to remove uncertainty as to the Commission's jurisdiction over its proposed sale and delivery of natural gas to El Paso for El Paso's fuel consumption in Texas pursuant to a contract entered into on July 19, 1960 (Ex. 2), as more particularly hereinafter described.[1]

On February 24, 1961, the Commission issued an order consolidating and setting down for hearing the application and petition above described and limiting the hearing (and disposition) to the question of the jurisdiction of the Commission over the sales and deliveries described in the said restricted-use (fuel consumption) contracts of March 15, 1960, and July 29, 1960, respectively.[2]

II. The Filings in Related Pending Proceedings

(a) There is pending before the Commission an application by El Paso Gas Supply Company[3] (Supply), a wholly-owned subsidiary of El Paso, filed with the Commission, on May 13, 1960, in Docket No. CP60-101, for a certificate of public convenience and necessity authorizing it to construct and operate a natural

[1]On Ex. 1, a "System Map, Houston Pipe Line Company" is shown the construction contemplated by Houston and El Paso Supply Company in connection with Houston's sale and delivery of gas to El Paso. (Tr. p. 106-7.)

[2]Commissioner Kline, dissenting, stated that in his opinion no hearing was necessary and that he favored an order holding the sales to be intrastate and not within the Commission's jurisdiction. 25 FPC 329.

[3]Supply's petition for intervention herein was denied March 30, 1961, on the ground that its and El Paso's interests both would be protected by El Paso's intervention, which had been granted on March 15, 1961.

gas transmission system for transportation of the gas to be received from Lo-Vaca and Houston near Three Rivers in Live Oak County, Texas, for El Paso; which after compression is to be transported through 227.6 miles of proposed 30" pipeline from there to a connection with El Paso's Sonora Plant in Sutton County, Texas (Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under contractual arrangements not yet completed, El Paso will sell to Supply sufficient Houston gas to fuel and operate the facilities proposed to be constructed and operated by Supply. (Tr. pp. 268-69; Ex. 7; Item D, Sch. 1.)

III. The Interventions

Petitions to intervene filed by El Paso, Pacific, Southern California Gas Company and Southern Counties Gas Company of California (California Distributors), Transwestern Pipe Line Company (Transwestern), The People of the State of California and Public Utilities Commission of the State of California (California), were granted by order of March 15, 1961, and these intervenors participated in the hearings.[4]

Other petitions to intervene, filed by Supply and Texas, were denied by order of March 30, 1961; prior to said order, however, the privilege of limited participation had been allowed to these companies. (Tr. pp. 4, 7.)

IV. The Hearings

Pursuant to the Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, a public hearing before the undersigned hearing

[4]Pacific and Transwestern, while represented by Counsel at the hearings, neither cross-examined witnesses, nor offered evidence nor filed briefs.

examiner was convened on March 21, 1961, and sessions were held also on March 22 and April 10, 1961.

Opportunity to file briefs was afforded all parties, and opening and reply briefs favoring exemption from jurisdiction were filed by Lo-Vaca, Houston and El Paso; the Staff, California and California Distributors (other than Pacific) filed briefs in opposition to exemption. In all, 242 pages of briefs were filed, 89 pages for exemption and 153 pages in opposition.

D. THE ISSUES

1. Limitation of Issues by Order of February 24, 1961

The Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, provided in pertinent part:

> (A) A public hearing, limited to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gasoline plant in Ector County, Texas, and over the proposed sale of gas by Lo-Vaca for use as fuel in El Paso's facilities outside Texas, will be held * * *.
>
> (B) The proceedings under the docket numbers in the caption hereof are hereby consolidated for hearing and disposal.

The issues are whether Lo-Vaca's and Houston's proposed sales and deliveries of gas to El Paso under the contracts of March 15, 1960, and July 29, 1960, are subject to the jurisdiction of the Commission or whether such proposed sales and deliveries of either of them are exempt therefrom by reason of the provisions of the restricted use contracts employed in making

them. Since there is general agreement among the parties and the witnesses that some part of the gas proposed to be sold and delivered for fuel consumption in Texas[5] as well as a part of that proposed to be sold and delivered by Lo-Vaca for fuel consumption outside of Texas, inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, any exemption found for these sales, or either of them, must be rested on those provisions of the contracts which seek to avoid jurisdiction.

II. Contentions of the Parties

(a) Lo-Vaca's position (Initial Brief, pp. 3-5) is as follows:

> * * * The sale is a direct sale to El Paso for its use in its own facilities, and as such, is not within the Commission's jurisdiction * * * direct sales of natural gas, being other than sales for resale, are not within the Federal Power Commission's jurisdiction under the Natural Gas Act. * * *
>
> * * * * * *
>
> Lo-Vaca's gas * * * will be commingled in El Paso's interstate pipeline, in order to transport it to the facilities where it will be consumed. However, the fact that natural gas which is the subject of a non-jurisdictional direct sale is transported in a commingled state with natural gas which is being sold in interstate commerce for resale and thus jurisdictional does not cause the non-jurisdictional

[5]El Paso's Reply Brief, p. 2, for example, states: "El Paso's argument * * * assumes that some of the molecules of the Houston gas will pass outside of Texas." (Cf. Tr. pp. 332, 343-44.)

character of the former sale to be lost where the non-jurisdictional sale takes place in a separate and distinguishable form. * * *

(b) Houston's position is stated in its Reply Brief (pp. 4-5) as follows:

> Houston's position is: *A sale of gas, even for resale, with a contractual obligation that it be consumed in the state of production is not jurisdictional even though the gas be commingled with gas which has not yet but eventually will be transported beyond the state of production.* [Emphasis supplied by Houston.]

(c) El Paso's position is "that the restricted use contracts are non-jurisdictional" (Initial Brief, p. 3), which position is amplified in its Reply Brief (p. 2) as follows:

> * * * there is no dispute * * * that "following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344)." * * * [and] (R. 332, 343) that there is no assurance that the specific molecules of gas sold to El Paso by either Houston or La Vaca will be consumed as fuel in El Paso's compressor stations * * * the case law unequivocally holds that preservation of the separate molecular identity of certain purchased gas throughout its transportation is not essential to a determination that it remains in *intrastate* commerce although it becomes a part of a commingled stream, the rest of which may be in *interstate* commerce. * * *

Particularly so (Reply Brief p. 2) with respect to the Houston gas:

> * * * extraction of the gas of Houston as such is *not* essential to the consumption of the gas of Houston solely as fuel in Texas in any meaningful legal sense * * *. [Emphasis supplied by El Paso.]

(d) The Commission Staff states "the principal legal question presented" (Brief, p. 1) to be:

> * * * whether a seller and a buyer of natural gas can prevent, by contract, sales of natural gas from being subject to FPC jurisdiction when the gas flows in continuous movement from State to State, commingled with gas from other sources, with gas from the commingled stream being resold for ultimate public consumption.

Staff's contentions as to this question are stated in its brief (pp. 11-12), as follows:

> * * * the sales of gas proposed by Lo-Vaca and Houston will be sales in interstate commerce for resale and, therefore, they will be subject to FPC jurisdiction. Lo-Vaca and Houston, however, contend that the contract provisions * * * limiting the use of gas will prevent the sales made under their said contracts with El Paso * * * from being sales in interstate commerce for resale and will forestall FPC jurisdiction. They do not claim that, absent such contractual limitations on use, their gas sales would not be in interstate commerce for resale and would not be subject to FPC jurisdiction. To the contrary, the avowed purpose of including in their contracts the limitations on use of gas was to circumvent jurisdiction.

(e) California's position, so far as it is pertinent to the limited issue herein presented (*infra*, footnote No. 10), is stated in its brief under "Conclusions" (pp. 12-13), as follows:

> * * * in addition to the fact that some of the gas will mix with out-of-state gas prior to use even under the best conditions, *it is impossible to assure that the gas purchased will be used as specified, and some, necessarily, will be transported out-of-state and resold.*
>
> It is likewise obvious that both "restricted" and "unrestricted" gas will be used interchangeably. When intake of one is cut down, the other will increase, and *vice versa*. Complete integration in supply is not only likely, but essential. El Paso's system requirements demand it. [Emphasis supplied by California.]

(f) California Distributors, (other than Pacific) state their concept of the issues in their joint brief (p. 18) as follows:

> The basic issue to be determined in this jurisdictional proceeding is whether the jurisdiction of the Federal Power Commission depends upon the actual flow of a commingled supply of natural gas in interstate commerce, or whether the question of jurisdiction is determined by whether a contract provides for the use of this commingled gas for non-jurisdictional purposes although physically, regardless of the contractual provision, the commingled gas must flow in interstate commerce. Stated in another fashion, the issue is as to whether the jurisdiction of this Commission is dependent upon fact

rather than fiction, upon *actual flow* rather than upon *contractual flow*. [Emphasis supplied by California Distributors.]

Their conclusion as to the interstate nature of the transactions is stated in said joint brief (p. 32) as follows:

From the moment that Houston and Lo-Vaca gas is received into the El Paso interstate pipeline system at Three Rivers, Texas, such gas will form a portion of a commingled supply of gas flowing in interstate commerce * * * (Cf. Exhibit A to said brief).

E. THE FACTS IN EVIDENCE

1. Corporate Status and Present Operations

(a) *Lo-Vaca* is a Texas corporation with its principal place of business in Corpus Christi, Texas (Item A). It "was organized to purchase, gather and deliver gas to El Paso" with which it has two contracts, executed on March 15, and May 16, 1960, respectively.[6] (Tr. p. 8.)

Lo-Vaca owns no facilities and engages in no operations; its operations including the proposed deliveries to El Paso will take place only when the facilities proposed to be constructed by Supply (Docket CP60-10) and by Lo-Vaca (Docket CI60-693) are authorized and completed.

---

[6]The May 16 contract is admittedly subject to the Commission's jurisdiction (Tr. pp. 21-24); but the March 15 contract is claimed to be exempt, because the gas is to be used by El Paso solely as fuel in El Paso's compressors and other facilities outside of Texas enroute to which said gas will be commingled with other gas being transported in El Paso's pipeline system (Tr. pp. 8-9).

(b) *Houston* is a Texas corporation having its principal offices in Houston, Texas (Petition p. 1). It is a wholly-owned subsidiary of Houston Natural Gas Corporation, which (like Houston) has been engaged for some years in a wholly intrastate business (Tr. pp. 104, 106).

Since 1925 Houston has engaged in the purchase, transportation and sale of natural gas within the State of Texas (Tr. p. 104). Currently, it delivers about 500,000 Mcf daily to local distribution companies for resale for consumption in various Texas communities and to industrial and commercial consumers located in the Texas Gulf Coast (Ex. F) area. Many of its purchase contracts contain a jurisdictional escape clause. (Ex. 4; Tr. pp. 15, 109, 111, 128-29.)

There are no present deliveries of Houston gas to El Paso. Deliveries are not physically possible until completion of construction by Houston and Supply; and they are not contractually possible until and unless the Commission declares that Houston's contract with El Paso "is a non-jurisdictional transaction." (Tr. p. 16; Ex. 2, p. 6.)

II. The Gas Sales Contracts

(a) *Lo-Vaca-El Paso jurisdictional contract of May 16, 1960.* By this admittedly jurisdictional (Tr. p. 24) contract,[7] Lo-Vaca agrees to sell and deliver 50,000 Mcf[8] average per day (at 14.65 ± psia of natural gas

[7]This sale of gas for which Lo-Vaca seeks a certificate of convenience and necessity, is herein involved only because of its effect on El Paso's task of separating this jurisdictional gas from the Lo-Vaca restricted use gas to be delivered to El Paso in a commingled stream with it and with Houston's restricted-use gas.

[8]Letter agreement (Ex. H) has been negotiated to increase this quantity to 80,000 Mcf. (Tr. pp. 207-08, 213-16.)

to El Paso at or near Three Rivers, Texas, at which delivery point title thereto vests in El Paso. The contract, which is free of all restrictions upon interstate transportation and resale in interstate commerce by El Paso (Tr. pp. 8, 21-24), is for 20 years at an initial price of 22¢ per Mcf, plus certain taxes, and escalating to 26¢. El Paso agrees to "take or pay" for certain minimum volumes, and Lo-Vaca agrees to dedicate reserves in the Texas Gulf Coast area to the performance of the contract.

(b) *Lo-Vaca-El Paso restricted use contract of March 16, 1939 (sic.)*—This contract is substantially identical with the May 16 jurisdictional one, being likewise for 20 years for like volumes at like pressure and like prices and with like take-or-pay provisions and like dedication of reserves.

The important difference is that, in addition to the employment therein of the words "gathering and delivery," in lieu of the "gathering and sale" appearing in the May 16 contract, this contract provides in Article X, Section 2:

> It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale.

Also, in Article XVI it is provided that—

> All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

By letter filed with the Commission on November 25, 1960 (Tr. pp. 23-24), Lo-Vaca states its intention to deliver the contractual quantities under both contracts, reserving its right to contest with respect to jurisdiction over the sales of the restricted use gas. (Tr. p. 9.)

(c) *Houston-El Paso restricted use contract of July 19, 1960*—Reciting El Paso's desire to purchase gas for consumption in Texas as fuel in its facilities and in the operation of Phillips' gasoline plant in Ector County, Texas, this contract for 70,000 Mcf per day is for 20 years, subject to earlier termination. As with the Lo-Vaca contract, this gas is to be delivered by Houston to Supply (for El Paso) at or near Three Rivers, Live Oak County, Texas, and El Paso will take title thereto at said point of delivery. Sales are to be on an interruptible basis (Article XV). The price is to be determined according to a formula which, if applied for the billing month of November 1959, would have produced a price of 19.5¢ plus certain taxes for each unit of one million BTU. (The gas to be of not less than 950 BTU per cubic foot.) El Paso agrees to pay for the 1,000 Mcf per day if available whether or not taken.

Restriction on the use of the gas is stated in Article II as follows:

> 2.1 * * * Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant

and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized by El Paso solely in intrastate commerce for use and consumption within the State of Texas.

2.2 El Paso covenants that all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. * * *

III. The Proposed Operations and Flow of Gas

(a) *Lo-Vaca*—Under both the unrestricted and restricted use contracts, gas will be produced and/or gathered by Lo-Vaca at wellheads in the field (in Texas, Tr. pp. 24-26) and delivered (for El Paso) by Lo-Vaca in a commingled stream (Tr. pp. 266-67), to Supply's proposed Coquat Compressor Station at or near Three Rivers, Live Oak County, Texas.

(b) *Houston*—The Houston gas will be gathered by Houston at wellheads in the field (in Texas, Tr. p. 104), and delivered (for El Paso) to Supply's proposed Coquat Compressor Station at or near Three Rivers, Texas, for transportation by Supply to El Paso at Sonora, Texas. At that station, Houston's gas will be commingled with the commingled stream of Lo-Vaca gas (Tr. pp. 266-68).

(c) *Supply*—Houston's gas will be separately metered before it is commingled at Coquat Station with Lo-Vaca gas (Tr. p. 268) for transportation by Supply in a commingled stream with Lo-Vaca gas (including Lo-Vaca's admittedly interstate gas) through 227.6 miles of 30" pipeline which *Supply* proposes to construct and operate (Docket CP60-101) from Three Rivers to El Paso's Sonora Plant in Sutton County, Texas (Tr. p. 271; Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under arrangements to be made with El Paso (Tr. p. 269), Supply will use some of this gas (about 1,460 Mcf per day—at 14.73= pb.) to operate its said Coquat Station at Three Rivers and its said transmission line from there to Sonora (Tr. p. 268; Ex. 7; Item D, Sch. 1).

(d) *El Paso*—Assuming Commission authorization therefor (Docket CP61-26), and the completion of Lo-Vaca's and Supply's proposed facilities and of its own new fuel lines and other necessary facilities (Tr. p. 135), El Paso proposes to route the commingled stream of Lo-Vaca and Houston gas (supplemented by additions to that stream at certain other points on its system, Tr. pp. 271, 282; 289-90, 307-8; Item B) to its fuel-consuming compressor stations located downstream of Sonora (Tr. p. 157, Ex. 7, 8), and at said stations to extract from the said commingled stream in the aggregate quantities of gas for such use equal to or greater than those it has agreed with Houston to extract and use in Texas and with Lo-Vaca to extract and use beyond Texas.[9] Flow diagrams and maps for such plant fuel use on an average demand day and a maximum demand day and the detailed oral testimony of El Paso's chief pipeline engineer fully illustrate El Paso's proposed fuel line construction and the quantities of fuel gas thereafter to be metered and withdrawn physically at these stations downstream of Sonora from the commingled stream containing the Lo-Vaca and Houston gas in accordance with its agreement to use such gas as fuel. (Lo-Vaca's outside of Texas and Houston's entirely in Texas.) (Exs. 5-A, 7, 8, 9, 10; and see also Map Ex. 6 and Tr. pp. 285-88; Items B and D.)

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[9]By contract, Lo-Vaca's gas is to be transported and used by El Paso outside of Texas. El Paso concedes that some of Houston's gas likewise physically will pass outside of Texas, stating (Reply Brief, p. 2), "there is no dispute that 'following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344).'" (Cf. also Tr. p. 282 and Ex. 10.)

F. DISCUSSION

1. The Statutes

Three sections of the Act warrant discussion. Section 7(c) provides, in pertinent part:

> No * * * person which will be a natural-gas company upon completion of any proposed construction * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction * * * of any facilities therefor, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *

Section 2(6) defines a "natural-gas company" to mean "a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

Section 2(7) defines "interstate commerce" to mean "commerce between any point in a State and any point outside thereof * * *."

Most important is the scope of the Commission's jurisdiction under the Act.

Section 1(b) provides in pertinent part:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural-gas for resale for ultimate public consumption for domestic * * * or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas * * *.

Lo-Vaca concedes that it will be a natural-gas company when it engages in the sales and deliveries of gas proposed to be made to El Paso under the unrestricted May 16, 1960, contract, and it seeks authorization therefor (Docket CI60-693). It intends also to make the sales and deliveries proposed to be made under the March 15, 1960, restricted-use contract whether or not such sales are held to be likewise subject to its jurisdiction (Tr. pp. 9, 23-24), reserving its right to contest any determination of jurisdiction over the sales of the restricted use gas.

Houston, on the other hand, seeks no authorization for its proposed construction and restricted-use sales and deliveries to El Paso, and does not intend to carry out its contract if its proposed sales and deliveries are found to be subject to the jurisdiction of the Commission. (Tr. p. 16 and Ex. 2, p. 6.)

Section 1(b) and the applicable cases interpreting said section are thus determinative of the question the Commission's jurisdiction over Lo-Vaca's and Houston's proposed sales and deliveries under the restricted-use contracts, or either of them. In this connection, Lo-Vaca contends that its restricted-use contract is for a direct sale (not a sale for resale); Houston contends that its restricted-use sale not only is likewise a direct sale but also that it is purely an intrastate sale. Both claim exemption for these contracts under various court and commission cases which have construed Section 1(b),—primarily relying upon *State of North Dakota v. F.P.C.*, 247 F. 2d 173.

The staff contends that Houston's sale and delivery as well as those of Lo-Vaca will be in interstate commerce and for resale.

California contends that since "all the gas [Houston's and Lo-Vaca's] will be transported in a commingled stream with other Texas-produced gas which is admittedly jurisdictional * * * any restriction is a contractual one, not physical. (R. 200-1);" also that El Paso's proposal for carrying out its contractual obligation "is *incapable* of meeting the stated objective of the contracts of use solely as fuel and within or without Texas."[10]

The California Distributors (other than Pacific) like the Staff and California consider the restricted use contracts as "a subterfuge to escape regulation" (Brief, pp. 7-8 "because as a matter of physical fact, the gas [Houston's as well as Lo-Vaca's] must and does flow out of the State of Texas as part of the commingled stream and, in fact, a portion thereof does flow to California to be used for purposes of resale." To a considerable extent these Intervenors and the Staff rely on *Oklahoma Natural Gas Co.*, 23 FPC 291 and 531.

II. The Applicable Decisions

A large number of decisions by the Courts and the Commission are cited in the briefs of the parties, the same cases generally being cited by the opposing parties, but with differing interpretations of their holdings and or the applicability thereof to the issues herein.

[10]Aside from the effects of "the fact of commingling," California urges, irrelevantly to the limited issues herein, that "since the volume purchased was based on a maximum day, and the facilities cannot use the whole of this volume on an *average* day, it follows that some of the 'restricted' gas *cannot physically* be used *'solely as fuel'* nor within the appropriate geographical area," particularly on *minimum* days. That issue, like those of price and public convenience and necessity, were postponed for later determination in the certificate proceedings. (Tr. pp. 200-07).

Controlling Decisions as to Houston Contract.—A very recent decision by the Commission appears to be dispositive of the question of jurisdiction insofar as it relates to Houston.

This most recent decision of the Commission is its Order Modifying and Adopting the Initial Decision of Presiding Examiner, issued June 30, 1961, in *Shell Oil Company, et al.*, Dockets No. G-5029, *et al.* (25 FPC 1316).[11]

> * * * we are unable to find any basis for concluding that we have jurisdiction over Shell's sale of gas to Columbian for the latter's Seminole carbon black plant * * *. Although neither the *North Dakota* nor the *Oklahoma Natural* cases, nor any of the cases cited by the parties are precisely in point, in its crucial facts the present case more closely resembles the circumstances of the first named than any of the others. Under Section 1(b) of the Act, we have jurisdiction over "the sale in interstate commerce of natural gas for resale," and "the transportation of natural gas in interstate commerce." Here we have a sale of gas produced wholly in Texas, transported wholly in Texas and consumed wholly in Texas. This local gas is not commingled with any gas from outside the state, and all of it is separated from the commingled stream before any of the stream leaves the state * * *. These facts which differentiate this case from the *Oklahoma Natural* case, pro-

[11]This decision was issued too recently to be mentioned in the briefs herein. The Presiding Examiner's Decision which was therein modified by the Commission was discussed in several briefs.

vide no basis for a finding that this is a sale in interstate commerce.

The Commission's Order further states (25 FPC 1316, at 1322):

> * * * And although the gas for the Seminole plant is commingled with gas for El Paso destined for interstate commerce * * * the respective volumes of interstate and intrastate gas are metered and known, and all the intrastate gas is separated from the commingled stream before any of the gas leaves Texas. Thus there is likewise lacking any basis for finding that the movement of the Seminole gas to its destination is transportation in interstate commerce.

The proposed sale by Houston, therefore, appears to be clearly an intrastate sale under the *Shell case*—and the *North Dakota* case the "crucial facts" of which *Shell* closely resembles. Houston's proposed sale is not a sale for resale in interstate commerce.[12]

As in *Shell*, the Houston gas is to be "produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas."

Also, as in Shell, "[t]his local gas is not [to be] commingled with any gas from outside the state, and all of it is [to be] separated from the commingled stream [containing also Lo-Vaca gas destined to leave Texas] before any of the stream leaves the State." (Docket G-5029, *et al.*)

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[12]Except for the gas to be resold to fulfill fuel requirements of Supply in Texas and those of Phillips' gasoline plant in Ector County, Texas, it is not a sale for resale in *intrastate commerce*. (Tr. pp. 141, 269.)

Likewise, under the *Shell* and *North Dakota* cases, the proposed movement of Houston's gas appears to be clearly intrastate, since the volumes of Houston gas "are [to be] separated from commingled stream before any of the gas leaves Texas." (*id.* p. 1322.)

Controlling Decision as to Lo-Vaca Contract—Lo-Vaca's restricted-use gas, on the other hand, is to be transported outside of Texas for use as compressor station fuel beyond the borders of that state. The proposed movement will be "transportation of natural gas in interstate commerce," and, therefore, subject to the Commission's jurisdiction.

Despite Lo-Vaca's contentions that its proposed restricted-use contract is not a sale for resale, it appears that such contract itself also may be subject to jurisdiction, as a "sale in interstate commerce of natural gas for resale," under authority of *Oklahoma Natural Gas Company, et al.*, 23 F.P.C. 291, and Order Denying Rehearing, 23 F.P.C. 531—a case in which the "crucial facts" are similar.

Since the *Oklahoma Natural* case is so closely in point as to appear to be dispositive of the question of our jurisdiction over Lo-Vaca, liberal quotation therefrom is herein made.

In the original decision, the Commission stated:

> * * * Consolidated in transporting gas from Texas for sale in Oklahoma and Kansas is a "natural-gas" company * * * Oklahoma Natural's gas is, of course, commingled with Consolidated's gas in the pipeline. While Consolidated, * * * proposed to sell and deliver for consumption in Oklahoma an amount of this commingled

> gas that is at all times in excess of the amount of gas delivered by Oklahoma Natural, it is inevitable that some of Oklahoma Natural's gas commingled with Consolidated's gas will be physically transported out of Oklahoma for consumption outside the state * * *. (23 F.P.C. 291, 292-93.)

Concerning the contractual provisions the Commission said:

> The exchange agreement provides: "Consolidated further agrees that all of the volumes of gas delivered by Oklahoma Natural to Consolidated hereunder will be used and consumed only within the State of Oklahoma and that such volume of gas will, under no circumstances, be transported by Consolidated in interstate commerce or resold for transportation and or resale in interstate commerce. It is understood, however, that * * * before any portion of the gas stream has left the State of Oklahoma it will be metered and determined that the volumes of gas metered and sold by Consolidated in its Northern Oklahoma system are at all times more than the volumes of gas being delivered to it by Oklahoma Natural." (23 F.P.C. 291, 293.)

The Commission's conclusions were:

> In our opinion the provision in the exchange agreement does not prevent Oklahoma Natural from being a natural-gas company within the meaning of the Act. Section 2(c) of the Act defines a "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such

gas for resale." "Interstate commerce" is defined in part to mean "commerce between any point in a State and any point outside thereof." Interstate commerce has taken place here because Oklahoma Natural has delivered gas which is transported outside the state and consumed outside it. *Interstate Gas Co. v. F.P.C.*, 331 U.S. 682, 687-689. This gas has entered the stream of interstate commerce, and has passed across the state border. As was said in *Deep South Oil Co. v. F.P.C.*, 247 F. 2d 882, 888 (CA5) "The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently there can be no question that petitioner is making sales for resale within the meaning of the Act." The fact that the contracting parties agree that Consolidated will deliver to its Oklahoma customers a greater amount of gas does not affect the interstate character of the transactions. The fact that Consolidated has not increased its deliveries to its Oklahoma customers, shows that by means of a contractual provision Consolidated is attempting to substitute Oklahoma Natural's gas for its interstate gas from Texas in making its Oklahoma deliveries. We do not think that the later contract can so effect the previous course of business. (23 FPC 291 293.)

Subsequently, in its Order Denying Rehearing, the Commission reaffirmed the previous decision, stating:

> * * * By contract with Oklahoma Natural, it would at all times deliver more gas to these customers than it would receive from Oklahoma Natural, but * * * admittedly Oklahoma Nat-

ural's gas became commingled with interstate gas in Consolidated's pipeline and was thus undeniably transported, in part, out of Oklahoma.

What we have here, is a sale of Oklahoma produced gas for resale to an interstate pipeline which would then deliver this gas, commingled with gas from out-of-state sources, to customers in both Oklahoma and Kansas. Sales to such an interstate system would be, in our opinion, part of the interstate course of business and would be clearly in interstate commerce * * *" (23 FPC 531 532.)

Characterizing the contract's attempt to avoid jurisdiction as a device, the Commission's order stated:

The contractual device of providing that Oklahoma Natural's gas shall be used in Oklahoma would not affect the interstate nature of the transaction that the parties propose. It is a mere statement that does not alter the course of operations other than to require that Consolidated continue to make deliveries in Oklahoma. If the contract were able to have the effect claimed, every producer or other seller of gas within a given state which sells gas to an interstate pipeline could escape jurisdiction if the pipeline happened to sell an equal or greater quantity of gas within the same state, and the seller had the right kind of contract with the pipeline. A problem would then be posed as to which sellers of gas had the privilege of being considered non-jurisdictional and which ones must be considered to be making the interstate sales. (23 FPC 531, 533.)

Both in its original *Oklahoma Natural* decision and in its Order Denying Rehearing, the Commission carefully distinguished the *North Dakota* case, saying in the former:[13]

> In our opinion, *State of North Dakota v. F.P.C.* * * * is distinguishable from the present case. In that case Montana-Dakota Utilities Company entered into contracts at approximately the same time for the purchase of "dump" gas at the price of 9 cents per Mcf at a processing plant belonging to other parties at Tioga, North Dakota, and for the purchase of "firm" gas at the same point for 16 cents per Mcf. All of the gas was to be produced in North Dakota * * * part of the 16 cent gas, * * * was to be transported by the Tioga-Williston line and was allegedly to be delivered by four proposed laterals to four towns in North Dakota where it would be consumed * * * We held with the examiner that the sale of the firm 16 cent gas to Montana-Dakota was entirely intrastate and were affirmed by the Court * * * (23 FPC 291, 294.)

[13]Chairman Kuykendall in his concurring opinion expressed the distinction thus: "In *State of North Dakota v. FPC*, 247 F. 2d 173, the gas over which we did not have jurisdiction was produced, transported, sold and consumed within the same state. *It was commingled and transported with gas which also had been produced within the state but eventually was transported out of the state and thus into interstate commerce. In other words the gas transported intrastate was never transported or commingled with any gas which had entered and was in interstate commerce.* Here the gas in question would enter, be commingled with, and transported with a stream of gas which already had been and still would be moving in interstate commerce. That is the *salient distinction* between the two situations." [Emphasis supplied.] (23 FPC 291, 296.)

In the original decision, the contrast was stated thus:

> In the present case the parties have attempted to keep Oklahoma Natural's gas separated from Consolidated's interstate stream, with which it is physically mixed, and to arrange by a contractual provision that all of Oklahoma Natural's gas be delivered in Oklahoma * * * Consolidated had already been delivering its own gas received from Texas to its Oklahoma customers. Its sales to these customers were, of course, sales in interstate commerce within the meaning of the Gas Act. The later introduction of Oklahoma Natural's gas into Consolidated's pipeline does not even from a conceptual viewpoint cause Oklahoma Natural's gas to be delivered to these customers alone. The situation therefore is different from that in the Montana-Dakota case where separate contracts with separate prices and for separate kinds of service were executed at approximately the same time, so that it could be said that in spite of physical commingling the firm gas was indentifiable and determinable and therefore intrastate * * * It would be a mere subterfuge to determine that the gas Oklahoma Natural would deliver to Consolidated in lieu of interstate gas, would be in intrastate commerce and non-jurisdictional.
>
> There is here more than a mere technical objection to the exemption requested * * * Because the amount of gas flowing in the interstate stream is altered by Oklahoma Natural's deliveries consumers beyond the state boundary are affected. This is the sort of thing that represents "commerce which concerns more States than one." It

was intended by the Gas Act that we regulate such interstate commerce, and we have no choice but to deny the request for an exemption. (23 FPC 291, 294-5.)

And in the Order Denying Rehearing saying:[14]

In *North Dakota v. F.P.C.*, * * * separation was achieved under different circumstances. Certain producers sold gas produced in North Dakota to Montana-Dakota Utilities at the tail-gate of a gasoline plant in North Dakota * * * all of the gas received at the gasoline plant which is delivered in North Dakota, was purchased in North Dakota * * * in the present case * * * Consolidated's pipeline carries both Oklahoma and Texas produced gas and its deliveries to its customers in Oklahoma include gas produced in Texas. In the *North Dakota* case there was a direct association between the sale of the 16 cent gas to Montana-Dakota and its delivery in North Dakota. In the present case, Consolidated's sales had no prior association with Oklahoma Natural's gas, for there was an interstate system already operating and delivering gas in Oklahoma and Kansas. Injecting Oklahoma produced gas into that system even with a contract that an equal amount of gas would always be delivered in Oklahoma does not alter the interstate nature of Consolidated's operations and Oklahoma Natural's sale. (23 FPC 531, 533-34.)

[14]The Commission also distinguishes on pages 533-34, *U.S. v. P.U.C.*, 345 U.S. 296; *Penna. Water & Power Co. v. F.P.C.*, 343 U.S. 414, 419; *Peoples Natural Gas Co. v. P.S.C.*, 270 U.S. 550; and *Hope Producing Co. et al.*, Docket No. G-15537, Feb. 3, 1959.

In its Order Denying Rehearing, the Commission, therefore, concluded as follows:

> In view of the above considerations and our previous order, Oklahoma Natural's sale to Consolidated is a sale for resale in interstate commerce. It appears Oklahoma Natural is a pipeline company as well as a producer, and there is no controversy on this point. Therefore Oklahoma Natural is a "natural-gas" company as a pipeline company, and we have no option but to assert jurisdiction, but in any case, Oklahoma Natural is engaged in activities that are a part of an interstate business and alter the interstate flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company. (23 FPC 531, 535.)

Substituting Lo-Vaca and El Paso for Oklahoma Natural and Consolidated, the pertinent portions of the above-quoted portions of that decision may be read to support similar conclusions as to the Lo-Vaca sale and El Paso's operations. As in *Oklahoma Natural*, the conclusion is clearly warranted that:

> Interstate commerce has taken place here, because [Lo-Vaca] * * * has delivered gas which is transported outside the state and consumed outside it. (23 FPC 291, 293.)

As in *Oklahoma Natural* also:

> This gas has entered the stream of interstate commerce, and has passed across the state border * * * [and] at least some portion of the gas * * * is resold to consumers outside the state of Texas * * * [where] by means of a contractual provision * * * [El Paso] is attempt

ing to substitute * * * [Lo-Vaca's] gas for its interstate gas from Texas [and New Mexico] in making [a similar quanity available for increasing] its * * * [California] deliveries. (23 FPC 291, 293).

Likewise as in *Oklahoma Natural:*

Injecting [Lo-Vaca's Texas] produced gas into * * * [El Paso's] system even with a contract than an equal amount of gas would always be * * * [used for compressor station fuel outside Texas] does not alter the interstate nature of * * * [El Paso's] operations and [Lo-Vaca's] * * * sale. (23 FPC 531, 534.)

Thus, as in *Oklahoma Natural,* it is concluded that:

* * * our jurisdiction * * * [is based] on * * * [Lo-Vaca's transportation and sale] being in interstate commerce as a part of the transaction essentially interstate with interstate consequences. (23 FPC 531, 534.)

And, finally as in *Oklahoma Natural:*

* * * [Lo-Vaca's] sale to * * * [El Paso] is a sale for resale in interstate commerce. * * * [Lo-Vaca] is a pipeline company as well as producer. * * * Therefore * * * [Lo-Vaca] is a "natural-gas" company as a pipeline company. * * * but in any case * * * [Lo-Vaca] is engaged in activities that are a part of an interstate business and alter the flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company. (23 FPC 531, 535.)

As pointed out, *supra*, in footnote 14, the *Oklahoma Natural* decision distinguished a number of the other cases cited and relied upon by Lo-Vaca and El Paso, and it should be noted that the subsequent *Shell* case not only reaffirmed and to some extent expanded the separability doctrine of the *North Dakota* case, but also reaffirmed and distinguished the *Oklahoma Natural* case, as follows:

> Nor are we able to find in any other facts concerning the Shell sale and the Columbian-El Paso exchange, or in the contractual provisions governing these transactions, any factors sufficient to convert what is nominally an intrastate sale of gas for the Seminole plant into an interstate sale * * * the sale of gas for the Seminole plant, although made under the May 20, 1948 contract governing the Shell sale, has no such immediate or substantial relationship to the Shell sale or to the Columbian-El Paso exchange as to justify finding it "part of the interstate course of business," in the language of the *Oklahoma Natural* case. Likewise, we are unable to determine that the interrelated transactions involved herein constitute a "contractual device," in the language of the *Oklahoma Natural* case, that might defeat Commission jurisdiction. Neither can we discern in the provisions of the contracts involved herein, or in the purpose or effect thereof, any justification for finding the sale of gas for the Seminole plant a sale in interstate commerce for resale subject to Commission jurisdiction.

Thus without undertaking to discuss herein the many cases pro and con cited and relied upon by the parties —all of which have been read and considered—it is concluded that the *North Dakota* case, as expanded by interpretation in the *Shell* case, is controlling as to the intrastate nature of Houston's contract, and Houston thereby is not subject to jurisdiction; and that, the *Oklahoma Natural* case, as distinguished from the *North Dakota* case both therein and in the *Shell* case, is controlling as to Lo-Vaca's becoming a participant in an "interstate course of business," and, despite a "contractual device," thereby becoming subject to jurisdiction.

The instant situations are so parallel, both in their "crucial facts" and in their purposes and effects, to these controlling cases, respectively, that any separate discussion of other cases herein would constitute a work of supererogation.

G. FORMAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the pleadings and briefs, and, in addition to the findings hereinbefore stated, it is further found and concluded that:

(1) El Paso Natural Gas Company is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) The sale and delivery of natural gas by Lo-Vaca Gathering Company to El Paso Natural Gas Company

for fuel consumption outside of Texas, as hereinabove described, and as more fully described in the record and in the application, will result in Lo-Vaca being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca thereby will become a pipeline company and a natural gas company within the meaning of the Natural Gas Act.

(3) The natural gas facilities proposed to be constructed and operated by El Paso, Supply, and Lo-Vaca, as hereinbefore described, are to be used in the transportation and sale of natural gas in interstate commerce, and hence subject to the jurisdiction of the Commission, and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sale and delivery of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged in the transportation of natural gas in interstate commerce or in the sale in interstate commerce of such gas for resale, and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act.

(5) The natural gas facilities proposed to be constructed and operated by Houston, as hereinbefore described, are to be used only in the transportation and sale of natural gas in *intrastate* commerce, and hence *not* subject to the jurisdiction of the Commission under the Natural Gas Act.

H. THE ORDER

Wherefore, It Is Ordered, subject to review by the Commission pursuant to its Rules of Practice and Procedure, that:

(A) Lo-Vaca Gathering Company's application for authority to carry out, without obtaining an appropriate certificate of convenience and necessity therefor, its proposed restricted-use contract of March 15, 1960, for the sale and delivery of natural gas to El Paso Natural Gas Company, be and it hereby is denied.

(B) Houston Pipe Line Company's petition for a declaratory order be, and it hereby is, granted and it hereby is held, declared and ordered that Houston's proposed restricted-use contract for the sale and delivery of natural gas to El Paso Natural Gas Company, and its proposed construction and operation of natural gas facilities incidental to the said proposed sale and delivery, will not be subject to the Natural Gas Act.

Robert E. Freer,

Presiding Examiner.

APPENDIX B

Petition for Review of an Order of the Federal Power Commission (Texas Case).

In the United States Court of Appeals for the Fifth Circuit.

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, Petitioner Versus Federal Power Commission, Respondent.

(September 24, 1963.)

Before Rives and Cameron, Circuit Judges, and Bootle, District Judge.

Cameron, Circuit Judge: The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1] The facts underlying the controversy presented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf

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[1]The section outlining jurisdiction is 15 U.S.C.A. § 717(b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added]

(meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

Jurisdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas. The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system, in Texas, the specified volumes of gas; that this gas will be commingled with

gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical in-metering—out-metering will not be faithfully consummated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. §717 (b). See, *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a dif-

ferent petroleum problem. ". . . the principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas v. Federal Power Commission*, 1957, 5 Cir., 247 F.2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No question of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 8, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. . . .
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, *supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed

and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two cases from the courts of appeal[2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States v. Public Utilities of California*, 1953, 345 U. S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use[3] in Nevada. Delivery of the power was made at a sub-station about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable . . . . But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies; in short, that the 'sales' themselves were separate . . . .", pp.

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[2]North Dakota v. Federal Power Commission, 1957, 8 Cir., 247 F.2d 173; City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F.2d 31, certiorari denied, 349 U.S. 420.

[3]The Navy consumed some of the power and resold another portion.

317-318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]

City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal. The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota v. Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The

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[4]Pennsylvania Water and Power Co. v. Federal Power Commission, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

question phrased by the court was: ". . . does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce . . .?" [P. 170] The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

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[5]In both North Dakota and Hastings, the Commissioner disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale; with other gas (or electricity) not delivered in inter-state commerce or not for resale, it is necessary for the Commission to determine 'whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) . . . . . is identifiable'. United States v. P.U.C. of California, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

The Commission here seeks to distinguish Hastings and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the initial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States v. Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here, even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here. Nor is there before us any question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest

and most practical way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] . . . Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practice is not proper here." *Federal Tender Board No. 1 v. Haynes Oil Co.*, 1935, 80 F.2d 468, 469.[7]

We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should*

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[6]Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

[7]*See also, Humble Oil and Refining Company v. Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 280 S.W. 2d 547, 552: "The fact that Humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas is *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The sub-

stance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdictional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

ORDER VACATED.

Rives, Circuit Judge, Dissenting:

As shown in 15 U.S.C.A. §717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are whether the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca . . . at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial

price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> "'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso."

". . . . Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and, at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's

gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El Paso represents and covenants' that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and north-

ward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed . . . . to supply its main-line compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Hous-

ton by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility," that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused to let its jurisdiction turn upon the provisions of contracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 882, and its companion case, *Shell Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular "restricted" use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by Lo-Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*, Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

APPENDIX C.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

United States Court of Appeals for the Fifth Circuit October Term, 1962

Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, Petitioners, versus Federal Power Commission, Respondent. No. 19,478

Before Rives and Cameron, Circuit Judges, and Bootle, District Judge.

JUDGMENT

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, Et Al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; the petitioners' request that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court. Rives, Circuit Judge, dissents

September 24, 1963

Issued as Mandate: Nov. 5, 1963.

APPENDIX D.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

In the United States Court of Appeals for the Fifth Circuit

Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, Petitioners v. Federal Power Commission, Respondent Southern California Gas Company, Et Al., Intervenor-Respondents No. 19478

(December 17, 1963)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al. as Intervenor-Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

Judge Rives: Dissent

Judge Bootle: Concur

APPENDIX E.

Chapter 15B.—Natural Gas.

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such trans-

portation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

Affidavit of Service by Air Mail.

In the Supreme Court of the United States. October Term, 1963. No. .....

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporations, Petitioners, vs. Lo-Vaca Gathering Company, a corporation, and Houston Pipe Line Company, a corporation, and El Paso Natural Gas Company, a corporation, Respondents.

State of California, County of Los Angeles, ss.

Viola Figg, being first duly sworn, deposes and says: That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for John Ormasa, William H. Owens, Milford Springer, and Robert M. Olson, Jr., who are the attorneys for the Petitioners in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, who are the printers and agents in this matter for said attorneys, and have their offices in the City of Los Angeles, State of California.

That on the 11th day of March, 1964, affiant served the within Petition for Writ of Certiorari on the Respondents in this action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Respondents at the business/residence addresses of said attorneys, as follows: George D. Horning, Jr., Esq., C. Frank Reifsnyder, Esq., Harry Albrecht, Esq., Hogan & Hartson, 800 Colorado Bldg., Washington, D. C., Attorneys for El Paso Natural Gas Co.; Howard E. Wahrenbrock Esq., Solicitor, 441 "G" St, N. W., Washington 25, D. C., Attorney for Federal Power

Commission; Hugh Q. Buck, Esq., Jefferson D. Giller, Esq., Richard L. McGraw, Esq., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of Southwest Bldg., Houston 2, Texas, Attorneys for Houston Pipe Line Co.; Bradford Ross, Esq., Sherman S. Poland, Esq., Ross, Marsh & Forster, 725-15th St., N. W. Washington 5, D. C., Attorneys for Lo-Vaca Gathering Co., J. Calvin Simpson, Esq., Gerald A. Laster, Esq., John Murphy, Esq., 514 State Bldg., San Francisco 2, Calif. Attorneys for Public Utilities Commission, State of California; and Hon. Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., at the county seat of said county, by then sealing said envelopes and depositing the same, with air mail postage thereon fully prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 11th day of March 1964

MARGARET H. FALES

Notary Public, in and for the County of Los Angeles, State of California

My Commission Expires January 11, 1966

[Seal]